

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: John Christopher MARTUCCI 143-38-0853

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2473

John Christopher MARTUCCI

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By his order dated 23 December 1987, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, revoked Appellant's Document upon finding proved the charge of misconduct. The specification thereunder found proved alleged that Appellant, while serving under the authority of the captioned document, on board the USNS CAPELLA, did wrongfully have in his possession certain narcotics, to wit: hashish. The charge was brought by the Government under the provisions of 46 U.S.C. 7704.

The hearing was held at Port Arthur, Texas on 19 October 1987. On 18 October 1987, Appellant had requested a change of venue to Hawaii, where he was residing, however, that request was denied, hearing on 19 October 1987 was held without the presence of the Appellant and under the in absentia provisions of 46 C.F.R. 5.515. In accordance with 46 C.F.R. 5.527 the Administrative Law Judge entered an answer of deny on behalf of the Appellant to the charge and specification.

FINDINGS OF FACT

On 27 October 1987, Appellant was serving as an ordinary seaman on board the USNS CAPELLA and was acting under the authority of his Merchant Mariner's document. On that date, during a customs search of the vessel, Appellant was found to be in possession of hashish by Customs Agents.

In drafting the charges, the Investigating Officer, in the

jurisdictional portion of the charge sheet had written: "46 U.S.C. 7704" as the statutory authority for initiating the charge of possession of hashish.

Because the subsequent disposition of this case, no further finding are appropriate or required.

BASES OF APPEAL

Appellant has raised several issues alleging a violation of his due process rights and illegal search and seizure by the Government. The following disposition of this case makes further discussion of the bases of appeal unnecessary.

OPINION

I

The charge of misconduct alleging possession of narcotics, brought under 46 U.S.C. 7704 is defective due to the manner in which the charge sheet is drafted. The Investigating Officer cited "46 U.S.C. 7704" at the top of the charge sheet as the basis for the charge and specification of possession of narcotics. Using 46 U.S.C. 7704 in this case as the jurisdictional authority is plain error. U.S.C. ,7704 is not directed at, nor does it mention possession (emphasis added) of drugs. The Commandant, in Appeal Decision 1770 (CAREY), stated that the provisions of 46 U.S.C. 239b (currently 46 U.S.C. 7704) merely authorize..."the Secretary to take certain actions when a person has been convicted of a violation of Federal or State narcotic drug laws or has been a user of narcotics..." It does not address possession of narcotics. CAREY, supra, is controlling, being squarely on point and emphatically requiring that 46 U.S.C. 239b (now 46 U.S.C. 7704) should not be cited as the jurisdictional authority on the charge sheet in a Revocation and Suspension Proceeding where the charge is possession of narcotics.

II

The charge and specification in this case should be dismissed, but without prejudice. The record of the proceeding reasonably indicates that the charge may be found proved.

CONCLUSION

The findings of the Administrative Law Judge will be set aside and the charge dismissed without prejudice to the Government to refile.

ORDER

The order of the Administrative Law Judge is VACATED. The findings are SET ASIDE. The charge is DISMISSED without prejudice to the Government to refile.

/S/ CLYDE T. LUSK, JR
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 7th day of November, 1988.

2. PLEADING

2.29 Defective

Improper jurisdictional cite in charge

Appeal Decisions Cited: 1770 (CAREY)

NTSB Cases Cited: None.

Federal Cases Cited: None.

Statutes Cited: 46 U.S.C. 239b, 46 U.S.C. 7704,

Regulations Cited: 46 CFR 5.527, 46 CFR 5.515.

***** END OF DECISION NO. 2473 *****